No. 14201

United States
COURT OF APPEALS
for the Ninth Circuit

CHET L. PARKER and LOIS M. PARKER,
Appellants,

vs.

TITLE AND TRUST COMPANY, a Corporation; PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees,

and

WALTER STEGMANN,
Appellant,

vs.

TITLE AND TRUST COMPANY, a Corporation; PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees.

On Appeals from the United States District Court for the District of Oregon.

BRIEF OF APPELLEES PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS

KRAUSE, EVANS & LINDSAY,
GUNTHER F. KRAUSE,
DENNIS LINDSAY,
916 Portland Trust Building,
Portland 4, Oregon,
Attorneys for Appellees Winans.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 7-54

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (Cont.)

Cases

TABLE OF AUTHORITIES (Cont.)

Cases

TABLE OF AUTHORITIES (Cont.)

Cases

Statutes and Rules

TABLE OF AUTHORITIES (Cont.)

Treatises

No. 14201

United States
COURT OF APPEALS
for the Ninth Circuit

CHET L. PARKER and LOIS M. PARKER,
Appellants,

vs.

TITLE AND TRUST COMPANY, a Corporation; PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees,

and

WALTER STEGMANN,
Appellant,

vs.

TITLE AND TRUST COMPANY, a Corporation; PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees.

On Appeals from the United States District Court for the District of Oregon.

BRIEF OF APPELLEES PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS

INTRODUCTION

These appeals, insofar as appellees Paul, Ross, Audubon, Linnaeous and Ethel Winans (four brothers and a sister, residing near Hood River, Oregon, hereafter some-

times collectively referred to as "the Winans" or "the appellees Winans") are concerned, arise from a judgment for $9,000 awarded them upon their cross-claim against appellants for damages suffered as a result of appellants' tortious and malicious conduct and false and defamatory representations.

The briefs of the appellants present an incomplete and misleading picture of the nature of the cross-claim of the appellees Winans and of the Findings of the District Court. We are therefore compelled to set forth a more complete statement of the case in order that the claim of the appellees Winans may be viewed in its proper perspective[1].

STATEMENT OF THE CASE, PRESENTING QUESTIONS INVOLVED

A. Proceedings Below

These appeals stem from the following involved proceedings below:

(1) Plaintiff-appellee Title and Trust Company by an amended complaint against defendant-appellants Chet Parker, Lois Parker and Walter Stegmann brought suit to cancel certain policies of title insurance issued by it and to obtain other declaratory relief (Tr. 3-50).

(2) Defendant - appellant Chet Parker counterclaimed against the Title and Trust Company for breach

---

[1]References to the record are identified as "Tr."; to Findings of the District Court as "F."; to the brief of appellants Parker as "P. Br."; and to the brief of appellant Stegmann as "S. Br.".

of his policies of title insurance, seeking damages of $125,000 together with attorneys fees of $12,500 (Tr. 56-60).

(3) The Title and Trust Company thereupon filed a third party action against third-party defendants-appellees Winans, seeking recovery over against them of any judgment which Chet Parker might obtain against it in his counterclaim and for various other declaratory relief (Tr. 61-71).

(4) Third-party defendants-appellees Winans in turn filed a cross-claim against Chet Parker, Lois Parker and Stegmann to recover $70,000 damages, $20,000 special damages and $100,000 punitive damages (Tr. 83-92)[2].

(5) The defendant-appellant Chet Parker in turn filed a cross-claim against the Winans, seeking recovery over against them for $125,000 in the event his title insurance policies were cancelled (Tr. 94-95). The defendant-appellant Stegmann also filed a cross-claim against the Winans seeking to recover over any judgment against him in favor of Title and Trust Company and to recover attorneys fees.

B. The Winans' Cross-Claim

In their cross-claim against the appellants, the Winans alleged that they had sustained general and special damages and were entitled to punitive damages, as a re-

---

[2]Third-party defendants-appellees Winans also filed a counterclaim against the Title and Trust Company (Tr. 81-83) but abandoned it at the conclusion of the trial (F. XLIV, Tr. 141).

sult of a conspiracy on the part of the appellants to defraud the Title and Trust Company and to injure them in their businesses and reputation and to defame them (Tr. 85-86)[3].

In substance, the Winans alleged they had sold certain property (designated herein as Lot 2) purportedly to appellant Stegmann, making a full disclosure to him as well as to appellant Parker (though not knowing the latter to be the real purchaser), of the defect in their title to Lot 2 by reason of the claim of ownership of the United States and of a previous settlement received by them upon a prior policy of title insurance on Lot 2 by reason of this defect; but that the appellants had nonetheless engaged in a conspiracy to defraud the Title and Trust Company by securing title insurance from them on Lot 2 with knowledge that the Title Company had not discovered the defect in title. The cross-claim alleged in detail the various acts in which the appellants had engaged and the ruses which they had adopted in order to perpetrate their scheme (Tr. 86-88).

The Winans further alleged that when a claim of loss was later made upon the policies of title insurance which had been issued by the Title and Trust Company, the Parkers, in furtherance of their conspiracy with Stegmann, maliciously and with intention to injure the Winans, represented that the Winans had never told

---

[3]Appellants Parker in their brief have questioned the source of the charge found "to be true" by the District Court that the appellants were engaged in a "conspiracy", stating that this was not charged in the original or amended complaint (P. Br. 37-38). The source, as noted above, was the cross-claim of the Winans.

them anything concerning the claim of ownership of the United States to Lot 2 and, in fact, had represented themselves as being the owners of Lot 2 with a marketable title thereto (Tr. 88-89). The cross-claim further alleged that appellants' malicious, false and defamatory representations were made with the knowledge that as a result of them the Title and Trust Company would file an action against the Winans and would publish such charges; and that, in fact, the present action was filed against the Winans by the Title and Trust Company charging that the Winans had falsely represented themselves as the owners of a marketable title to Lot 2 and had failed to disclose their knowledge of the defect in the title to Lot 2, which charges were published and given wide circulation (Tr. 89-90).

As a result of the conspiracy and of the malicious, false and defamatory statements and representations, the cross-complaint alleged that the Winans had been generally damaged in their businesses and reputation and had been specially damaged by being forced to retain and pay for the services of attorneys to defend themselves against the present action brought against them as a result of the wrongful acts of the appellants (Tr. 90). The Winans also prayed for exemplary and punitive damages by reason of the malicious and intentional acts of the appellants (Tr. 91).

C. The Trial: Conflict in Testimony

The trial of the case before the District Court (a jury having been waived) took 13 days, during which time 45 persons testified, over 125 exhibits were intro-

duced in evidence, and there was heard, we believe, some of the most bizarre and conflicting testimony ever presented in a courtroom.

Seemingly—and as the appellants testified—there was nothing to the case. Stegmann obtained an option from the Winans for the purchase of both Lots 1 and 2 for $100,000. He assigned this option to Chet Parker for $25,000, who thereafter took over dealing directly with the Winans as the purchaser, ultimately paying them $95,250 for the property. Chet Parker also obtained a policy of title insurance for $125,000 on the property. The United States then claimed ownership of Lot 2, of which claim Stegmann and Parker had never been advised by the Winans nor had any previous knowledge. Since Title and Trust Company admitted there was a defect in the title to Lot 2 by reason of the claim of the United States, Parker was entitled (Lot 2 being worth more than $125,000) to the full face value of his title policy.

The biggest trouble with appellants' story, to begin with, was that the Winans did not agree with it. Their testimony was that they had fully disclosed to Stegmann the nature and basis of the claim of the United States to ownership of Lot 2 (Tr. 797-798, 801-802, 839-841, 846-847, 850, 913, 914, 946-947, 1603, 1615-1617, 1626-1631, 1716-1718; Exhibit 311, Tr. 2265-2266) and that the only person they had ever dealt with in the sale of the property was Stegmann who had represented he wanted it as a primitive retreat (Tr. 790, 825, 836, 843, 897-898, 916, 923, 1009, 1606, 1612, 1619-1620).

The Winans testified, however, that they had met Chet Parker as a surveyor friend of Stegmann and in fact had disclosed to him also the nature and basis of the defect in their title to Lot 2 (Tr. 823-825, 831-836, 907-908, 1618-1620, 1641, 1708-1709).

Moreover, not only the Winans but also disinterested third persons and the documentary evidence disagreed with appellants' version. From two reputable attorneys, a United States civil engineer, and a real estate broker came confirmation of the disclosure by the Winans of the defect in the title to Lot 2 (Tr. 773, 776-781, 783, 943-944, 946-947, 965, 968-970, 980-982, 989, 1002-1004, 1008-1009, 1026-1028, 1034-1036). From two United States Forest Service employees came unequivocal testimony that Chet Parker and Stegmann had been put on notice of the defect in title to Lot 2 on the same day that Parker had ordered a title report from the Title and Trust Company (Tr. 1049-1057, 1061-1062, 1066-1070; Exhibits 71 and 72, Tr. 2182, 2183).

The testimony of the Winans that they had never heard of, or dealt with, Parker as the purchaser of the property was confirmed by the attorney who handled the sale for them and by the civil engineer who was present during surveys of the property and in drawing up the description to be inserted in the deed (Tr. 972-973, 987, 1006, 1028-1029, 1041, 1044-1045). Appellants' testimony that Parker had taken over the purchase by being personally present at a certain meeting on August 18 at the Winans was disputed by the two civil engineers (Tr. 1029-1030, 1041-1045, 1663-1667, 1669-1671);

and even more important, in confirmation of the Winans' testimony that only Stegmann had been present at the August 18th meeting and had personally executed a so-called "Notice of Election to Purchase", there was introduced in evidence the document itself—a key exhibit in the case (Exhibit 307, Tr. 2264-2265)—admittedly bearing Stegmann's signature, after both Chet Parker and Stegmann had sworn that Stegmann had never executed any such document because on August 18th appellants said Parker was known to be the purchaser and there would have been no occasion for Stegmann to execute this document (Tr. 280-282, 1991-1997).

Along with such testimony contradicting appellants' testimony as to their relations with the Winans, there was introduced considerable other evidence as to past dealings between the Parkers and Stegmann and between these three appellants and third persons, which contradicted the appellants' testimony that Stegmann had never acted as an agent for the Parkers and had never been engaged in any ventures with them.

As finally submitted to the District Court, this case presented a plethora of conflicting testimony, requiring the Court in an unusual degree to pass upon the credibility of the witnesses. Truly this case, as this Court said in *Wittmayer v. United States,* 118 F. (2d) 808, 811 (1941) quoting from Mr. Justice Holmes in *Adamson v. Gilliland,* 242 U.S. 350, 353, is:

> ". . . pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon con-

flicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

D. The Findings of Fact

Based upon the entire record before it, the District Court resolved the conflict in testimony against the appellants, opining that their testimony "was not corroborated on any material issue by any credible independent evidence" and "was false in many particulars and, when not actually controverted, was highly improbable and, at times, fantastic" (Tr. 107).

Insofar as the Winans' cross-claim is concerned, the District Court made numerous pertinent Findings of Fact:

(1) Stegmann negotiated with the Winans initially for the purchase of Lot 1 and later for the purchase of Lot 2 as a private mountain retreat for himself and his family, the Winans at first offering to sell Lot 1 for $80,000 and their interest in Lot 2 for $20,000, with Stegmann finally taking an option to buy both lots for $100,000 (F. XV, Tr. 125; F. XVI, Tr. 125-127).

(2) The Winans in their negotiations with Stegmann made a full disclosure of (a) the claim of ownership of the United States to Lot 2, advising him that the United States asserted that title thereto had never passed from the United States to the State of Oregon because it had never been surveyed; and (b) a policy of title insurance which had previously been obtained on Lot 2 and for which a cash settlement had been received

on account of the unmarketability of the title by reason of the claim of ownership asserted by the United States (F. XV, Tr. 125).

(3) Stegmann subsequently introduced Chet Parker to the Winans as a friend who had some surveying experience; and the Winans, prior to the transfer of their interest in the property, also made a disclosure to Chet Parker of the nature and basis of the claim of ownership of the United States to Lot 2 and of the settlement of the policy of title insurance previously issued on Lot 2 by reason of the claim of the United States (F. XXII, Tr. 129).

(4) While the deed for the transfer of the property was being drafted, the Winans again discussed with Stegmann the claim of ownership of the United States to Lot 2 and again offered to assist him in clearing the title thereto through Congressional action. At the closing of the transaction the Winans also advised an attorney (who they thought was acting for Stegmann but who unbeknown to them was employed by the Parkers to close the transaction for them) of the claim of ownership of the United States to Lot 2 and offered to assist in attempting to clear said title by said act of Congress (F. XXV, Tr. 130-131; F. XXVI, Tr. 131-132).

(5) In all negotiations and transactions between the Winans and Stegmann, the latter represented that he was acting on his own behalf and concealed from them the true fact he was acting for the Parkers. The Winans never learned that the Parkers had any interest in the transaction until after the recording of the deed (F. XV, Tr. 125; F. XXXVIII, Tr. 133-134).

(6) The Winans never represented to the Parkers or to Stegmann that they had a marketable title to Lot 2, nor did they ever represent that the claim of ownership of the United States to Lot 2 was inconsequential, minor and without basis in fact (F. XXXIV, Tr. 135-136).

(7) In making a claim of loss on their policy and negotiating thereon with the Title and Trust Company, the Parkers represented that the Winans had not disclosed any defect in the title to Lot 2 or disclosed their knowledge of the claim of ownership of the United States to Lot 2 and intentionally induced the Title and Trust Company to believe that the Winans represented themselves to be the owners of Lot 2 with a good title thereto (F. XLIII, Tr. 140).

(8) Such false representations slandered the Winans by imputing to them the commission of a crime within the meaning of Section 23-550 O.C.L.A. (F. XLV, Tr. 141-142).

(9) Such false representations and conduct of the Parkers were made with the knowledge that the probable consequences thereof would be to injure the Winans and that the Title and Trust Company would institute legal proceedings against the Winans (F. XLIII, Tr. 140-141; F. XLVI, Tr. 142).

(10) The false representations and conduct of the Parkers concerning the Winans were largely responsible for the inclusion of the Winans as defendants in the original action filed by the Title and Trust Company, in which it was alleged that the Winans falsely repre-

sented they were the owners to a marketable title to Lot 2, that none of the Winans had disclosed to the Parkers or Stegmann the claim of ownership of the United States to Lot 2 or the settlement of the policy of title insurance previously issued on Lot 2 by reason of the claim of the United States. These charges were published in the Hood River paper and given wide circulation in Hood River, Oregon, and the surrounding area where the Winans reside (F. XLVI, Tr. 142; F. XLVII, Tr. 142-143).

(11) The Winans were damaged as a result of the action filed against them and the accompanying publicity in that they were required to employ and pay for attorneys to defend them and in that two of the Winans found it more difficult for them to obtain credit in connection with their businesses (F. XLVII, Tr. 142-143).

(12) The Winans sustained damages of $9,000 (F. XLVIII, Tr. 143).

(13) In connection with the purchase of the property from the Winans, the Parkers and Stegmann engaged in a conspiracy to defraud the Title and Trust Company; and the false representations by the Parkers to the Title and Trust Company were made in furtherance of the conspiracy between themselves and Stegmann (F. XXXV, Tr. 136; F. XLVI, Tr. 142).

Accordingly, upon their cross-claim, the Winans were awarded a judgment for $9,000 damages and their costs and the respective cross-complaints of the appellants against the Winans were dismissed with prejudice (Tr. 146-150).

E. Questions Presented

In appealing from this judgment in favor of the Winans, the appellants have by their specifications of error and in their briefs asserted that the District Court erred (1) legally, in awarding the Winans any damages at all; (2) factually, in making certain Findings; and (3) in dismissing the respective cross-complaints of the appellants against the Winans (though this point is not argued in appellants' briefs).

Accordingly, insofar as the appellees Winans are concerned, the ultimate questions involved in this appeal are (1) whether, assuming the correctness of the Findings of the District Court, the judgment awarding the Winans $9,000 damages is erroneous as a matter of law; (2) whether certain Findings of Fact of the District Court are "clearly erroneous", due regard being given "to the opportunity of the trial court to judge the credibility of witnesses" (Rule 52 (a), Federal Rules of Civil Procedure); and (3) whether the District Court erred in dismissing the respective cross-claims of the appellants against the Winans.

We believe the first two questions are sufficiently intertwined, so that in the interests of brevity they may be discussed together.

ARGUMENT

I.

The District Court did not Err in Awarding the Appellees Winans Damages for the Harm They Sustained as a Result of the Appellants' Wrongful and Malicious Acts and Representations.

A. Nature of Winans' Cross-Claim

In their cross-claim, as can be readily seen from the summary set forth above, the appellees Winans alleged a series of wrongful acts on the part of the appellants, pursuant to a conspiracy, which resulted in harm to their reputation and businesses and caused them to incur litigation expenses.

The Winans' cross-claim is not an action for slander—as appellants have erroneously sought to limit it and characterize it (P. Br. 2, 69)—but is an action on the case.

The remedy of action on the case, the Oregon Supreme Court has recently stated, "is still preserved, and . . . is employed by the courts in cases whose facts do not fall into the pattern of any other well-defined cause of action" (*Kuhnhausen v. Stadelman,* 174 Or. 290, 299, 148 P. (2d) 239, 242 (1944)).

In *Cash v. Garrison,* 81 Or. 135, 158 P. 521 (1916), the Oregon Court had previously sustained, as an action on the case, a complaint setting forth a long series of wrongful acts contributing to injuries sustained by the plaintiff, saying:

> " 'A series of wrongful acts, all aimed at a single result and contributing to the injury complained of, to wit, the destruction of one's business, credit and reputation, may be counted upon collectively, as producing that result, in an action on the case': Oliver v. Perkins, 92 Mich. 304 (52 N.W. 734)." (81 Or. at 139, 158 P. at 522)[4]

The Federal Rules of Civil Procedure having substituted the word "claim" for the traditional and hydra-headed "cause of action", there has been set forth in the Winans' cross-claim the aggregate of the various operative facts giving rise to their rights enforceable in the courts. *Original Ballet Russe v. Ballet Theatre,* 133 F. (2d) 187, 189 (2nd Cir. 1943).

B. Appellants' Wrongful Acts

1. Conspiracy to Defraud

The appellees Winans charged in their cross-complaint that the appellants had engaged in a conspiracy to defraud the appellee Title and Trust Company (Tr. 85-86), and the District Court found that in fact the appellants had engaged in such a conspiracy by securing a policy of title insurance on property which they knew had a title defect and in an amount greater than the actual value thereof (F. XXXV, Tr. 136).

The relation and significance of appellants' scheme to defraud the Title and Trust Company to the Winans' cross-claim for damages is that the Winans were caught

---

[4]See also Kaller v. Spady, 144 Or. 206, 214-215, 24 P. (2d) 351, 354 (1932); Williamson v. Columbia Gas & Electric Corp., 110 F. (2d) 15, 18 (3rd Cir. 1940); 52 Am. Jur., Trespass on the Case, Secs. 2, 4, 8, 9, 10, and 11, pp. 900-904.

as innocent (but necessary) victims in the web of appellants' scheme and were injured thereby.

By the rather adroit maneuver of dividing their briefs in two separate parts—one part dealing with the appellee Title and Trust Company, and the other part dealing with the appellees Winans—appellants must not be allowed to divert this Court's attention from a point that cannot be too strongly emphasized, namely, that the appellees Winans were injured as a direct consequence of, and as a part of, the over-all tortious conduct of the appellants in conspiring to and almost succeeding in defrauding the Title Company.

In terms of the ultimate success of the appellants' scheme, insofar as the appellees Winans were concerned, it can now be seen that it was essential that the Winans have no knowledge that the Parkers were the real purchasers and were obtaining title insurance on Lot 2 with its defective title. Thus it was that Stegmann was used by the Parkers as their "front man" to insulate them from the transaction[5]. Appellants' purpose, in part, was to place themselves in such a position that if it was necessary for the Parkers to ever assert a claim against the Title Company they could say they had no previous knowledge of any defect and that the property had been represented to their assignor as having a marketable title; and this is exactly what the Parkers actually later did assert.

---

[5]Appellants' scheme in this respect almost gave way when during the drafting of the deed, the Winans' attorney suggested consulting the Title and Trust Company, but was prevented from so doing by Stegmann's vigorous objections (Tr. 978-979; F. XXV, Tr. 131).

While the harm suffered by the Winans flowed more directly from the forces set in motion by the Parkers in connection with their making their claim for loss to the Title and Trust Company, we ask this Court to bear in mind that the false representations and actions of the Parkers at this later time were only the last strands in the web of their conspiracy to defraud the Title Company and were found to be so by the District Court (F. XLVI, Tr. 142).

Oregon law is clear that tort feasors are liable to the persons injured for all the natural and direct consequences of their wrongful acts. *Gilman v. Burlingham,* 188 Or. 418, 423, 216 P. (2d) 252, 255 (1950). The damages inflicted on the Winans by the appellants were such reasonably foreseeable consequences of their scheme to defraud the Title Company.

In the interests of brevity, we shall leave to the brief of the appellee Title and Trust Company the marshaling of the evidence supporting the Findings of the District Court as to the fraudulent scheme of the appellants to defraud the Title Company.

2. Injurious Falsehoods and Intentional Infliction of Damages

The appellees Winans charged (Tr. 88-90) and the District Court found that as part of the conspiracy to defraud the Title and Trust Company:

First, that the Parkers represented to the Title Company that the Winans had not disclosed any defect in the title to Lot 2 or their knowledge of the claim of ownership by the United States;

Secondly, that these representations were false;

Thirdly, that these false representations were made with the knowledge that the Winans would be injured thereby;

Fourthly, that these false representations were largely responsible for the inclusion of the Winans as defendants in the original action instituted by the Title and Trust Company, in which it was alleged that they had falsely represented they were the owners of a marketable title to Lot 2 and had not disclosed the claim of ownership of the United States to Lot 2 or the settlement of a title insurance policy previously issued thereon;

Fifthly, that as a result of said action and the attendent newspaper publicity, the Winans were required to incur litigation expenses and sustain other damages (F. XLIII, Tr. 140-141; F. XLV, Tr. 141-142; F. XLVI, Tr. 142; F. XLVII, Tr. 142-143).

(a) *Authorities*

Under the Findings of the District Court, the appellants are liable as a matter of law for the intentional harm which they inflicted on the Winans by their false representations to the Title Company.

It is an accepted principle in the law of torts that a person who intentionally makes a false statement concerning another with knowledge that the other person may suffer therefrom, is liable for the resulting harm. See Restatement of Torts, Sec. 873, Vol. IV, pp. 430-432; Harper, Law of Torts, Secs. 235 and 242, pp. 498-

499, 516; Salmond, Law of Torts (9th Ed. 1936), Secs. 150 and 151, pp. 607, 619-622; Gattley, Libel and Slander (4th Ed. 1953), pp. 140-142.

The principle has been thus phrased in the Restatement of Torts, Sec. 873:

> "A person who, with knowledge of its falsity, makes an untrue statement concerning another which he realizes will harm the other is liable to the other for such resulting harm as he should have realized might be caused by his statement." (Vol. III at p. 430)[6]

Salmond, *op. cit.*, p. 619, states it this way:

> "It may be stated as a general rule that it is an actionable wrong maliciously to make a false statement respecting any person with the result that other persons deceived thereby are induced to act in a manner which causes loss to him."

Illustrative of the principle enunciated by these authorities and particularly apposite to the case at bar is *Gale v. Ryan,* 263 App. Div. 76, 31 N.Y.S. (2d) 732 (1st Dep't. 1941), where the complaint alleged that the defendant—as part of a scheme to defraud the United States Government and the State of New York by concealing income—intentionally submitted false and fraudulent tax returns as to wages purportedly received by the plaintiff. As a result of these false and fraudulent statements, the complaint alleged that the plaintiff had

---

[6]Insofar as the person making the false statement acts for the purpose of causing harm to the other, the Restatement (Sec. 873, Comment (a)) points out that it falls within the broader principle of Sec. 870: a person who does any tortious act for the purpose of harming another or his pecuniary interests is liable for the resulting harm.

been and still was subject to investigation with the threat of criminal indictment, that his name and reputation had been injuriously affected, that he had been prevented from attending to his business and had been subjected to expense in procurement of counsel.

The appellate court held that the complaint stated a good cause of action and reversed an order dismissing the complaint, saying:

> "Under the allegations of the complaint, we think that the plaintiff has stated a cause of action which has received recognition. It has been held (Ratcliff v. Evans, [1892], 2 Q.B. 524, 527): 'That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title.' " (263 App. Div. at 78, 31 N.Y.S. (2d) at 734)

Similarly, in *Al Raschid v. News Syndicate Co., Inc.*, 265 N.Y. 1, 191 N.E. 713 (1934), the complaint alleged that the defendant gave false information to immigration officials knowing his statements to be false, as a result of which the plaintiff was prosecuted and deported. The Court of Appeals in New York held that an action would lie for maliciously giving false information resulting in intentional injury to another, even though no cause of action would lie for malicious prosecution:

> "Whatever we may call it an action does lie, however, if the complaint states any facts showing a wrong which the law recognizes and will redress.

> One may not be liable for malicious prosecutions and yet be legally responsible for maliciously circulating or giving false information resulting in intentional injury to another. Even a lawful act done solely out of malice and ill will to injure another may be actionable. Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203, 27 A.L.R. 1411. 'A man has a right to give advice, but advice given for the sole purpose of injuring another's business and effective on a large scale, might create a cause of action.' American Bank & Co. v. Federal Reserve Bank, 256 U.S. 350, 358. . . . An action will lie for knowingly and intentionally and without reasonable justification or excuse inducing a breach of contract." (265 N.Y. at 3-4, 191 N.E. at 714)

That an action will lie for intentionally making false statements known to be false resulting in damage to another, has been recognized in many other cases noted below[7].

Analysis of the above cases indicates that they are a variety of the wrong of fraud or misrepresentation. The usual action for fraud and deceit involves the defendant deceiving the plaintiff so that he causes harm to himself by his own mistaken act. Instead, here we have involved the wrong of deceiving other persons so that they by their mistaken acts cause harm to the plaintiff. It is for this latter type of wrong for which the appellees Winans sought and were awarded damages by the District Court. By their representations and actions,

---

[7]Ratcliff v. Evans, [1892] 2 Q.B. 524; Morasse v. Brochue, 151 Mass. 567, 574-575, 25 N.E. 74, 76-77 (1890); Reid v. Providence Journal Co., 20 R.I. 120, 125, 37 A. 637, 638 (1897); Husted v. Husted Co., 193 App. Div. 493, 184 N.Y.S. 844 (2nd Dep't. 1920); Ledwith v. International Paper Co., 64 N.Y.S. (2d) 810, aff'd. 271 App. Div. 864, 66 N.Y.S. (2d) 625 (1st Dep't. 1946).

the appellants Parker deceived the Title and Trust Company into believing that the Winans had not disclosed their knowledge concerning the defect in title to Lot 2; and the Title and Trust Company, acting upon this mistaken notion induced by the appellants Parker as part of their conspiracy with the appellant Stegmann, brought the present suit against the Winans with its attendant damages and expenses to the Winans for which they here seek recompense.

Closely related to, and perhaps indistinguishable from, the above authorities dealing with liability for intentional falsehoods, is the so-called prima facie tort doctrine[8], enunciated by Justice Holmes in *Akins v. Wisconsin,* 195 U.S. 194 at 204 (1904) that:

> ". . . prima facie, the intentional infliction of temporal damages is a cause of action, which . . . requires a justification if the defendant is to escape."[9]

or, as stated by Lord Bowen in *Mogul Steamship Co. v. McGregor, Gow & Son Co.,* 23 Q.B.D. 598, 613, aff'd. [1892] A.C. 25:

> "Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's prop-

---

[8]Generally, see Note, 52 Columbia Law Review 503-513 (April 1952).

[9]Many years later in American Bank & Trust Co. v. Federal Bank, 256 U.S. 350 (1921), Justice Holmes stated:

> "If without a word of falsehood but acting from what we have called disinterested malevolence a man by persuasion should organize and carry into effect a run upon a bank and ruin it, we cannot doubt that an action would lie." (256 U.S. at 358)

See also Holmes "Privilege, Malice and Intent", 8 Harvard Law Review, 1-14 (1894).

erty or trade, is actionable if done without just cause or excuse."

So, for example, in *Mangum Electric Co. v. Border,* 101 Okla. 64, 222 P. 1002 (1923), a plaintiff brought an action for damages against certain defendant owners of an electric light plant, as to which the plaintiff as mayor and the city council had called an election to vote bonds to construct a municipal light plant. The petition alleged that the defendants to defeat the bond issue had conspired together to injure the plaintiff in his business and reputation and pursuant to the conspiracy had secured a pregnant woman to endeavor to induce the plaintiff through false representations to produce an abortion upon her. The Court viewed an action for damages as lying for the doing of intentional acts intended to damage another in his property and in his profession through false and fraudulent representations and referred to other cases where such intentional actions have been designated as "malicious wrongs" (the intentional doing of a wrongful act without justification)[10].

The case at bar falls within the ambit of the prima facie tort doctrine in all of its essentials: the appellants intentionally made false representations which in the ordinary course of events were likely to harm the Winans; such harm actually resulted in pecuniary damage to the Winans; and the appellants have no excuse for their conduct, other than they were attempting to de-

---

[10]See also, Keene Lumber Co. v. Leventhal, 165 F. (2d) 815 (1st Cir. 1948); Advance Music Corporation v. American Tobacco, 296 N.Y. 79, 83-84, 70 N.E. (2d) 401, 402-403 (1946).

fraud the Title Company, which is scarcely legal justification for their actions.

No Oregon cases have been found on the right of action for damages for intentional falsehoods, but there would seem to be no doubt that Oregon recognizes that the intentional infliction of temporal damages is a cause of action for which recovery may be had.

Thus, in *Johnson v. Oregon Stevedoring Co. Inc.,* 128 Or. 121, 270 P. 772 (1928), Oregon recognized the prevailing doctrine that the intentional unwarranted act of depriving a person of employment was a legal wrong for which damages might be recovered, citing with approval the following language from Webb's Pollock on Torts (p. 406):

> "One of the aims of the common law has been to protect every person against the wrongful acts of every other person, whether committed alone or in combination with others, and to this end it has provided an action for injuries done by disturbing a person in the enjoyment of any right of privilege which he has. See Walker v. Cronin, 107 Mass. 562." (128 Or. at 136, 270 P. at 776)

And in *DeMarais v. Stricker,* 152 Or. 362, 53 P. (2d) 715 (1936) involving an action for wrongful interference with plaintiff's employment, the Court said:

> "At common law, one prevented from securing employment through wrongful and malicious interference of another may recover damages, and this principle applies to interference preventing the formation of a contract as well as interference with existing contractual relations, and 'malice', as used in such case, means nothing more that the inten-

tional doing of an injurious act without justification or excuse." (152 Or. at 365-366, 53 P. (2d) at 716)

Article I, Section 10, of the Oregon Constitution provides:

". . . every man shall have remedy by due course of law for injury done him in his person, property or reputation." (ORS, Vol. V, p. 1000)

This provision of the Oregon Constitution—a constitutional re-affirmation of the ancient common law axiom "Ubi Jus Ibi Remedium"—was very recently referred to and utilized by the Oregon Supreme Court in holding in a case of first impression in Oregon that an action will lie for libelous matter contained in a will. *Kleinschmidt v. Matthieu,* 58 Or. Ad. 125, 206 P. (2d) 686 (1954). That Oregon is not adverse to expanding its common law to apply remedies for the reddess of acknowledged wrongs seems equally evident from the recent case of *Hinish v. Meier & Frank Co.,* 166 Or. 482, 113 P. (2d) 438 (1941), where it was held that an action for damages would lie for breach of the right of privacy[11].

---

[11]In this case, the Oregon Supreme Court stated:

"We are called upon, as Mr. Justice Holmes says somewhere, 'to exercise the sovereign prerogative of choice' between the view that the courts for want of a precedent are impotent to grant redress for injury resulting from conduct which universal opinion in a state of civilized society would unhesitatingly condemn as indecent and outrageous, and the view that the common law, with its capacity for growth and expansion and its adaptability to the needs and requirements of changing conditions, contains within itself the resources of principle upon which relief in such a case can be founded. * * * *

"We should not be deterred by fear of being accused of judi-

As the Court of Appeals for the Seventh Circuit has pointed out, the absence of state precedent affords no justification for the denial of a common law remedy where the rights of an individual have been invaded by the wrongful acts of another, *Daily v. Parker,* 152 F. (2d) 174, 177 (1945), it being said that "If the state courts have not acted, we are free to take the course which sound judgment demands." Likewise, this Court noted in *Heine v. New York Life Ins. Co.,* 50 F. (2d) 382, 386 (1931), that "to have a precedent, there must be an antecedent case; but the lack thereof does not defeat a right or privilege."

(b) *Evidence*

Appellants would dispute the applicability of the foregoing principles, claiming that there is no evidence in support of the Findings of the District Court.

In accordance with the policy of this Court not to weigh the evidence or disturb the lower court's findings, where the testimony is conflicting and the record contains sufficient evidence to support them (*Continental Casualty Co. v. Schaefer,* 173 F. (2d) 5, 8 (1949)), appellants' challenge to the Findings is mostly clearly refuted by a brief summarization of some of the supporting evidence:

---

cial legislation. Much of our law is judge-made, and there are those who think that it is the best law . . . The common law's capacity to discover and apply remedies for acknowledged wrongs without waiting on legislation is one of its cardinal virtues." (166 Or. at 503-504, 113 P. (2d) at 446-447).

The representations[12]—Attorney Buell, who represented the Title and Trust Company during the negotiations with the appellants Parker in connection with their claim of loss, testified as follows with respect to Chet Parker's representations:

> "Q. What, if anything, did Mr. Parker say regarding any—well, first of all, his knowledge of any defect in the title to the forty acres?
>
> A. Well, he told us that he did not know anything about any defect in the title until after the deed had been received and recorded." (Tr. 1771)

Attorney Buell also testified:

> ". . . so I particularly questioned him [Chet Parker] about just exactly what Mr. Winans had had to say about the property on the occasion that they were up on the lake. It was in the course of that questioning that he stated that he did not have an opportunity to talk very much with Mr. Winans and that there was no discussion between them as to the title on that one occasion that he had met him." (Tr. 1773)

Later, the District Court itself took up the questioning of Attorney Buell:

> "The Court: In other words, through these negotiations you assumed that the Parkers had no knowledge of the defects?
>
> The Witness: That is right.

---

[12]F. XLIII "Following discovery of the defect in title to Lot 2 by the plaintiff [Title and Trust Company], defendants Parker presented a claim of loss to the plaintiff and said parties entered into settlement negotiations . . . defendants Parker also represented to the plaintiff that the third-party defendants [Winans] had not divulged to them any defect in the title to Lot 2 or disclosed their knowledge of the claim of ownership of the United States to Lot 2" (Tr. 140).

The Court: And it was on that basis that you were negotiating?

The Witness: And also that Mr. Stegmann had no knowledge of the defect." (Tr. 1800)

Likewise, Attorney Marsh, who represented the Parkers at the conferences with the Title and Trust Company, testified:

"Q. [By Mr. Buell] Mr. Marsh, during these discussions that you have mentioned, it was at the least assumed by everybody, was it not, that Mr. and Mrs. Parker had no—received no knowledge or notice from the Winans family about the defect of the title prior to the time that they got their deed?

A. Oh, yes." (Tr. 1848)

During the negotiations between the Parkers and the Title and Trust Company, three different proposed contracts were prepared by the Title and Trust Company looking toward a settlement of the Parker's claim (Exhibit 7, Tr. 1901-1902; Exhibit 8, Tr. 1902-1907; Exhibit 9, Tr. 1908-1913). Each of these agreements contained the representation that:

"Whereas, the Parkers have represented to Company and hereby warrant that they had no knowledge of any defect in the title to said Lot 2 prior to their payment of the purchase price therefor and acceptance and recording of the deed to said property." (Tr. 1902, 1909)

In answer to questions by the District Court, Attorney Marsh testified that the Parkers had never objected to signing this representation:

"Q. [By the Court] That same recital appears in all three documents; does it not?

A. . . . and I know that we read these parts, these parts were read to him on 7 and 8. I do not remember any objection to them.

Q. That was not the basis of Parker's refusal to sign the agreement?
A. Not a bit." (Tr. 1851)

Further representations were made by the Parkers as to the non-disclosure to them by the Winans of any title defect when they staged a show of surprise when the Title Company displayed to them a file showing the Winans had obtained a settlement of a title insurance policy previously issued on Lot 2 and thus presumably would have had knowledge of the title defect[13].

Falsity of Representations[14]—The Findings of the District Court as to the falsity of the representations

---

[13]"Q. [By Mr. Jaureguy] Surprised to learn that the Winans knew about this defect when they sold the property?
A. [Attorney Buell] He expressed some surprise. * * *
Q. Did they seem surprised when they saw the letter from Miss Winans to the title company that was in the file?
A. Well, there was—we all, as I said, went through the same discussion that we could not conceive how anybody would attempt to sell a piece of property for that amount of money in view of their knowledge of the circumstances without making a disclosure of their knowledge.
Q. Yes.
A. And Mr. Parker had told us that he did not know anything about the state of the title.
Q. Well, now, to get back to the question, did Mr. and Mrs. Parker express surprise when they read the letter from Miss Winans to the title company that is in evidence in this case?
A. Well, as I say, they did." (Tr. 1781-1782)

Alstadt, Title and Trust Company's Vice-President, also testified to the surprise expressed by the Parkers when they were shown this file (Tr. 1809-1810).

[14]F. XXII: ". . . on August 31, while on a surveying party on the premises, the third-party defendant Paul Winans, although not knowing that the defendant Chet L. Parker was interested as a principal in acquiring the interest of the third-party defendants in said Lots 1 and 2, discussed with defendant Chet L. Parker the nature and basis of the claim of ownership of the United States to Lot 2 and the settlement

made by the Parkers that the Winans had not disclosed to them the defect in the title to Lot 2, is supported by an abundance of testimony, noted below, showing disclosures to and knowledge of the Parkers of (a) the defect in the title to Lot 2, (b) the previous policy of title insurance on Lot 2 which had been settled by reason of the defect in the title thereto, and (c) the necessity of Congressional action to clear the Winans' title[15].

---

of the policy of title insurance previously issued on said Lot 2 by reason of said claim of the United States" (Tr. 129).

F. XXX: "At all times during the negotiations for and the purchase of said property, the defendants Stegmann and Parkers knew that the United States claimed title to said Lot 2, . . . that third-party defendants Winans had previously obtained a policy of title insurance on said property . . . and had collected a substantial loss on such policy by reason of the Government's ownership of Lot 2; and that third-party defendants Winans had been advised that an act of Congress would be required to give them marketable title to such property" (Tr. 134).

F. XXXIII: "Although defendants Parker had been informed by Paul Winans that the United States claimed ownership to Lot 2, . . ." (Tr. 135).

See also, F. XV, Tr. 125; F. XXV, Tr. 130-131 re disclosures by the Winans to Stegmann and his knowledge of the defect in the title to Lot 2; F. XXVI, Tr. 131-132 re disclosure by the Winans to the attorney for Parkers at closing of transaction.

[15]As to the disclosures to and knowledge of the Parkers, see the testimony of Paul Winans (Tr. 831-836, 841, 846, 847, 907-908); Ross Winans (Tr. 1618-1619, 1641); Claude Parrott, U. S. Forest Service (Tr. 1049-1057, 1061-1062; Exhibit 71, Tr. 2182; Exhibit 72, Tr. 2183-2184); Joyce Petersen, U. S. Forest Service (Tr. 1066-1070); Attorney Kenneth Abraham (Tr. 943-944, 946-947, 1013); Attorney Vawter Parker (Tr. 989, 1008-1009).

As to the disclosures to and knowledge of Stegmann, see the testimony of Paul Winans (Tr. 797-798, 801-802, 839-841, 846-847, 850, 913-914, 1716-1718; Exhibit 311, Tr. 2265-2266); Ross Winans (Tr. 1615-1617, 1626-1631); Ethel Winans (Tr. 1603); Attorney Vawter Parker (Tr. 965, 968-970,

The basis for the Findings of the District Court as to the falsity of the Parkers' representations is clearly reflected in the opinion of the Court:

> "This is not a case of an honest mistake. Neither in their pleadings nor in the evidence adduced at the trial did the Parkers admit that they knew of the defect in title until after the full purchase price had been paid and a deed delivered.
>
> "Throughout the case, they, as well as Stegmann, maintained that they had no knowledge of the defect in title and that neither the Winans nor anyone else had informed them of the claim of the United States to Lot 2. The testimony of the Parkers and Stegmann was not corroborated on any material issue by any credible independent evidence. Their own testimony was shown to be false in many particulars and, when not actually controverted, was highly improbable and, at times, fantastic.
>
> "On the other hand, the testimony of Paul Winans was corroborated not only by documentary evidence but also by the testimony of a number of disinterested reputable witnesses." (Tr. 107-108)

The Findings of the District Court being *thus* based on the trial judge's passing on the credibility of witnesses, this Court has "repeatedly held that, under such circumstances, it would not be inclined to disturb the findings of the lower court" (*Faivret v. First Nat. Bank in Richmond,* 160 F. (2d) 827, 829 (1947).

Likelihood of Harm[16]—The record clearly reveals

980-982, 1002, 1003-1004); Rettlaw Haynes, U. S. civil engineer (Tr. 1026-1028, 1034-1036); Clyde Linnville, real estate broker (Tr. 773, 776-781, 783).

[16]F. XLIII: ". . . Said misrepresentations were material and were made with intent to defraud the plaintiff, and with the knowledge that the probable consequences of such false

that the Parkers knew that on the basis of their representations that the Title and Trust Company intended to file suit against the Winans for their *fraudulent* failure to disclose their knowledge of the defect in the title to Lot 2. Thus Attorney Buell, speaking of the settlement negotiations between the Title Company and the Parkers, testified:

> "Q. [By Mr. Krause] Maybe I can make it a little clearer. Your information that you were eliciting from him as to what Winans had said to him or represented and what he knew about the condition of the title, good or bad, that that information was needed by you in the preparation of a complaint that would be brought against the Winans?
>
> A. Yes.
>
> Q. That you informed him of?
>
> A. Yes." (Tr. 1795-1796)

In answer to questions of the District Court along this line, Attorney Buell further testified:

> "THE COURT: Was there any discussion with Mr. and Mrs. Parker to the effect that in a title suit they could not prevail unless there had been a misrepresentation made to the Parkers? In other words, if the Parkers knew of a defect, then Title and Trust could not prevail if it filed the action, the suit?
>
> The Witness: [Buell] I do not recall it being

---

representations made to plaintiff would injure third-party defendants Winans" (Tr. 140-141).

F. XLVI: "Said representations by defendants Parker to plaintiff concerning the third-party defendants were made with the knowledge that the plaintiff would institute legal proceedings against the third-party defendants and that the third-party defendants would be subject to adverse publicity in Portland and in Hood River and would require them to incur expenses to defend such proceedings and to clear their names and reputations of false imputations of crime and dishonesty cast upon them by the defendants" (Tr. 142).

stated as bluntly as that. They were both advised that the basis of the suit would be misrepresentation of the state of the title by the Winans or a concealment of their knowledge of the defect." (Tr. 1799-1800)

In a similar vein, Attorney Dashney who had represented the Parkers at the conferences with the Title and Trust Company, testified:

"Q. [By Mr. Buell] Mr. Dashney, do you recall at the conference on the 27th Mr. Parker was there and that after we finally reached a tentative agreement or verbal agreement to go ahead and settle and sue—or rescind the transaction, that we explained to Mr. Parker in general terms what the basis for a suit for rescission against the Winans family would be?

A. Yes, I believe we did, Mr. Buell." (Tr. 1857)

It should, of course, be kept in mind that in each of the proposed contracts between the Title and Trust Company and the Parkers, whereby their claim was to be settled and wherein the Parkers represented that they had no knowledge of any defect in the title, provision was made for the institution of suit against the appellees Winans (Exhibit 8, Tr. 1903-1905; Exhibit 9, Tr. 1909-1911).

Harm Inflicted[17]—The evidence relating to the dam-

[17]F. XLVII: "Such false representations made by defendants Parker were largely responsible for the inclusion of third-party defendants Winans as defendants in the original action filed by plaintiff. Such action and the publicity which it received in both Portland and Hood River newspapers caused injury and damage to the third-party defendants Winans in that it not only required them to expend their own time in the preparation and trial of this case but also required them to employ and pay for the services of attorneys to represent them in such action. Such action and pub-

ages suffered by the Winans is set forth in a subsequent part of this brief (pp. 48-51). For the present, we need only to note appellants' argument that the actions and representations of the Parkers played no part in the filing of the original action by the Title and Trust Company against the Winans.

Can it be doubted for one moment that a suit would not have been instituted against the Winans charging them with fraud, if the Parkers—or Stegmann[18]—had informed the Title and Trust Company of the full disclosure which had been made to them by the Winans, instead of falsely representing that they had no knowledge?

Having made a full disclosure of the property they sold and having only deeded away their "right, title and interest," the Winans were, of course, not subject to suit by anyone. The Parkers knew these true facts, but chose to deceitfully conceal their knowledge from the Title

---

licity resulting therefrom likewise made it more difficult for third-party defendants Paul Winans and Linnaeus Winans to obtain credit in connection with their respective businesses" (Tr. 142-143).

F. XLVI: ". . . plaintiff did institute the present suit in which the complaint charged that the third-party defendants falsely represented they were the owners of a marketable title to Lot 2 and that none of the third-party defendants disclosed to the defendants Parker and Stegmann the claim of ownership of the United States to Lot 2 or the settlement of the policy of title insurance issued by the Pacific Abstract Title Company on Lot 2 as a result of said claim of the United States. . . ." (Tr. 142).

[18]The record indicates that after the Title and Trust Company learned of the title defect to Lot 2, it made an investigation of Stegmann and contacted him by phone (Tr. 1776-1777, 1793-1794).

Company and to falsely misrepresent that no disclosure had been made to them by the Winans. For the effect of the Parkers' deceit in their dealings with the Title and Trust Company, we have only to look to some of the allegations of both the original complaint[19] and the amended complaint[20].

3. Defamation

The appellees Winans charged in their cross-complaint (Tr. 88-90) and the District Court found that the Parkers (besides falsely representing that the Winans had not divulged to them any defects in their title to Lot 2) also by their words and conduct wilfully and intentionally induced the Title and Trust Company to believe that the Winans had represented themselves to be the owners of Lot 2 and to have a good title thereto.

---

[19]Thus, paragraph XXV of the original complaint (Exhibit118) alleged "That neither Ethel Winans nor Paul Winans nor any other party represented by them disclosed to defendants Chet L. Parker, Lois M. Parker or Walter Stegmann the fact of or basis of the claim of ownership of the United States of America to said Lot 2 or the fact of the claim made by Ethel Winans against said Pacific Abstract Title Company on account of said claim of ownership and the settlement of said claim . . . and that if such a disclosure had been made, the said consideration would not have been paid" (Tr. 2248).

[20]Similarly, in the third-party complaint the Title and Trust Company alleged that "third-party defendants represented to Parkers and/or Stegmann as the agent of Parkers that Ethel Winans had a good marketable title to the said Lot 2"; that "third-party defendants knew that said representations were false and knew the reasons and facts pertaining to the defect of the title of Ethel Winans to said Lot 2 and to the basis of the claim of the United States to ownership of said property"; and that the "Parkers relied on said representations" (Tr. 63-64).

The District Court further found that these false representations and actions by the Parkers constituted slander of the Winans by imputing to them the commission of a crime within the meaning of Section 23-550, O.C.L.A.[21] by having falsely represented that they were the owners of land to which they had no title and by conveying such land with intent to defraud the Parkers (F. XLIII, Tr. 140-141; F. XLV, Tr. 142).

(a) *Slander per se*

Under Oregon law, as under the law generally, words imputing the commission of a crime for which a person is liable to indictment and punishment in the penitentiary are actionable as slander per se without the need of proving special damages. *Davis v. Sladden,* 17 Ore. 259, 266 (1889); *Barnett v. Phelps,* 97 Or. 242, 244-245, 191 P. 502, 503 (1920); *Quigley v. McKee,* 12 Or. 22 (1885); Restatement of Torts, Sec. 571, Vol. III, pp. 171-175. The material element "which lies at the foundation of the action" is said to be "social disgrace, or damages to character in the opinion of other men" (*Quigley v. McKee,* 12 Or. at 23).

As to the form or nature of imputation, it is not necessary that the charge be made in a direct, positive

---

[21]Section 23-550, O.C.L.A. (presently ORS 165.220) read as follows:

"If any person shall falsely represent that he is the owner of any land to which he has no title, or shall falsely represent that he is the owner of any interest or estate in any land, and shall execute any conveyance of the same with intent to defraud anyone, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than six months nor more than two years."

and open manner, or that any particular crime be specified by name or description, or that the words used follow the technical terms of the indictment. In considering the words used, the court may look to the circumstances surrounding their utterance. *Peck v. Coos Bay Times Pub. Co.,* 122 Or. 408, 420, 259 P. 307, 311 (1927); 33 Am. Jur., Libel and Slander, Secs. 9, 11, and 12, pp. 43-46; Restatement of Torts, Sec. 571, Comment (c), Vol. III, p. 172; *Christopher v. American News Co.,* 171 F. (2d) 275 (7th Cir. 1948); *Sandifer v. Electrolux Corporation,* 172 F. (2d) 548 (4th Cir. 1949).

Here the Findings of the District Court make it clear that the Parkers by their words and actions had intentionally induced the Title and Trust Company to believe that the Winans had falsely represented themselves as being the owners of a good title to Lot 2, the circumstances surrounding their utterances and representations being that the Winans had conveyed Lot 2 to the Parkers without disclosing any defect in the same. Admittedly, the Parkers did not also state in words that the conveyance had been made with "intent to defraud"; but in imputing the crime covered by the statute it was not necessary for the Parkers to charge that it was done with intent to defraud. See *Keller v. Safeway Stores, Inc.,* 111 Mont. 28, 34-35, 108 P. (2d) 605, 609-610 (1940).

Appellants Parker, however, contend that the Parkers did not impute the commission of the crime because Ethel Winans was the only person who could have committed the crime and the Parkers never made any

representations to the Title and Trust Company concerning her (P. Br. 70-72).

Appellants' argument runs counter to the settled law of defamation. Whether Paul Winans could or could not have been guilty of violating Section 23-550, O.C.L.A., is beside the point[22]. "The sound rule is," said the Court in *Rea v. Harrington,* 58 Vt. 181, 186 (1885), "that if the words impute a crime they are actionable per se, even though the charge could not be true. It is the obloquy of the charge that produces the damage, and not the exposure to punishment."

Thus, it is actionable to impute the commission of a crime, regardless of whether the person charged could not commit the crime or whether, in fact, no crime had actually been committed. See 53 C.J.S., Libel and Slander, Sec. 53 (c) p. 106; *Lee v. Crump,* 146 Ala. 655, 40 So. 609 (1906); *West v. Hanrahan,* 28 Minn. 385, 10 N.W. 415 (1881); *Stewart v. Howe,* 17 Ill. 71 (1855); *Quigley v. McKee,* 12 Or. 22, 23 (1885).

Appellants also contend that there is no evidence whatsoever in support of the District Court's Finding

---

[22]We, however, disagree with appellants' contention that Ethel Winans was the only person who could have committed the statutory crime. Oregon statutory law (ORS 161.220) abrogates the distinction between an accessory before the fact and the principal and provides that "all persons concerned in the commission of a felony or a misdemeanor, whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals and shall be indicted, tried, and punished as principals." Accordingly, even though Ethel Winans was the record holder to Lot 2 and actually executed the conveyance thereof, it would still have been possible to indict Paul Winans as a principal on the basis that his representations aided and abetted in the commission of the statutory crime.

with respect to any words or conduct by the Parkers imputing the commission of the statutory crime (P. Br. 79-83). It is, of course, difficult to reconcile such a contention with the sworn testimony of Chet Parker given at his deposition some five months prior to the trial:

> "Q. *Did you ever tell any of these persons Mr. Buell has named as being present at any of these meetings* [between representatives of the Title and Trust Company and the Parkers] *that Paul Winans told you he had a good and marketable title to this property which he was selling you?*
>
> A. *I remember saying that, yes.*
>
> Q. Did you also say that Paul Winans had never told you anything about the Government making a claim to the back 40 acres?
>
> A. I don't know whether I told him or not.
>
> Q. I am not asking about that. I am asking you what you told them.
>
> A. Well, I don't remember of telling them that.
>
> Q. Could you have told them that?
>
> A. I possibly could have.
>
> Q. Did you tell them that Paul Winans never told you anything about a policy of title insurance he had on that property which had been paid off by reason of the Government claiming ownership of the back 40 acres?
>
> A. I don't know that I told them that. I don't remember of telling them that. I probably did" (Tr. 2067-2068) (Emphasis supplied).

In confirmation of this, we have the entry in the Parkers' diary referring to the meeting on October 12 with the Title and Trust Company, in which Chet Parker wrote in his own hand:

> "I told them I thought Winans thought they owned the property or they would not have gave me a deed for it" (Tr. 2236).

Along with this testimony, there must also be considered the testimony previously set out (supra, pp. 27-29) that at the conferences with the Title and Trust Company the Parkers represented that the Winans had never disclosed to them any defect in the title to Lot 2 or their knowledge of the claim of ownership of the United States and that all of the conferences between the Parkers and the Title and Trust Company were predicated on this assumption. The utterances of the Parkers in these surrounding circumstances were what, the District Court found, induced the Title Company to believe that the Winans had falsely represented themselves to be the owners of Lot 2 with a good title thereto and conveyed the same. By inducing such a belief in the Title Company the Parkers were imputing the commission of a crime to the Winans.

(b) *Slander per quod*

Even if the appellants' words and conduct are not said to constitute slander per se, they would still be actionable to the extent of the special harm caused by them, as defamatory communications tending to harm the reputation of the Winans and to lower then in the estimation of the community and to deter third persons from associating or dealing with them. *Barnett v. Phelps,* 97 Or. 242, 191 P. 502 (1920). In such a case, the Winans would be entitled to recover not only for the special harm caused to them but also for their general loss of reputation. See Restatement of Torts, Secs. 559 and 575, Vol. III, pp. 140-143, 185-187.

The special damages which were pleaded and proven by the appellees Winans as a result of the defamatory communications made by the Parkers to the Title and Trust Company are discussed, infra, pp. 49-51.

(c) *Libel*

The allegations[23] concerning the Winans published in the original complaint filed by the Title and Trust Company were libelous per se, imputing not only the commission of a crime in violation of Section 23-550, O.C.L.A., but also exposing the Winans to ridicule, contempt and disgrace in the community of Hood River, Oregon. See e.g. *Woolley v. Plaindealer Pub. Co.,* 47 Or. 619, 84 P. 473 (1906); *Woolley v. Hiner,* 164 Or. 161, 100 P. (2d) 608 (1940); and generally, Harper, Law of Torts, Sec. 243, pp. 518-522.

As we have previously emphasized, the Parkers' defamatory and intentionally false representations made with knowledge of the use to which they were going to be put by the Title Company were the legal starting place for the subsequent publication in the complaint of the defamatory allegations concerning the Winans.

Under the circumstances, various courts have held that an action for libel will lie against those causing the inclusion of defamatory allegations in an otherwise privileged writing. *Laun v. Union Electric Co.,* 350 Mo. 572, 166 S.W. (2d) 1065 (1942); *Rice v. Coolidge,* 121 Mass. 393 (1876); *Ewald v. Lane,* 104 F. (2d) 222 (D.C.

[23]See particularly Paragraphs XVII and XXV, Exhibit 118 (Tr. 2246, 2248).

D.C. 1939); *Bigelow v. Brumley,* 138 Ohio St. 574, 37 N.E. (2d) 584 (1941); Annotation, 144 A.L.R. 633-635.

C. Appellants' Claim of Privilege

In their briefs appellants for the first time during this entire case assert that their words and conduct to the Title and Trust Company were absolutely privileged, for which there can be no liability (P. Br. 73-76; S. Br. 11-12).

1. Intentional Harm

Privilege is a doctrine peculiar to the law of libel and slander. Insofar as the Winans' cross-claim against the appellants involves liability resulting from their conspiracy to defraud the Title Company or under the principles applicable to liability for intentional falsehoods and malicious wrongs, the common law rules as to libel and slander are not involved and the defense of absolute privilege would not be applicable.

Thus, in *Schauder v. Weiss,* 88 N.Y.S. (2d) 317, aff'd. 276 App. Div. 967, 94 N.Y.S. (2d) 748 (2nd Dept. 1950) the plaintiff alleged a conspiracy between two defendants and her husband to institute a fraudulent divorce action against the plaintiff on the basis of a false report by one of the defendants that the plaintiff had committed adultery. In striking a defense of privilege interposed by the defendants, the Court stated:

> "The fact, however, that plaintiff's alleged grievance was sustained as a result of wrongful acts which do not spell out one of the commonly recognized torts does not mean that plaintiff has no cause of action at all. On the contrary . . . the trend of the deci-

sions of our courts has been towards the establishment of the broader doctrine that 'harm intentionally done is actionable if not justified' * * *

"In the light of the doctrine enunciated in the foregoing cases, it would seem that the facts alleged in the fourth cause of action plead a right of action basically similar to that in Al Raschid v. News Syndicate Co., supra, which may be characterized as an 'action on the case' or, to quote from the learned English author, Sir John Salmond, an action for 'injurious falsehood'. . . *To such action the stringent rules of libel and slander do not apply and consequently the defense of privilege may not be interposed.* . ." (88 N.Y.S. (2d) at 322-323) (Emphasis supplied)

To say that there is a defense of absolute privilege to an action on the case to recover damages for harm intentionally and maliciously inflicted would be to deny the doctrine itself. Only a superior right can conceivably justify causing harm to another through intentional and malicious falsehoods. The record in this case is barren of any such justification, revealing only the brazen falsehoods perpetrated by the appellants as part of their scheme to defraud the Title Company.

Appellants Parker have sought in their brief to find legal justification for their acts by contending that the Winans' claim against them is one for "instigating a groundless suit" (P. Br. 69). Asserting that there is no liability for the malicious prosecution of a civil suit, appellants contend (though citing this court no authority whatsoever) that one who causes a party to file a civil malicious prosecution must therefore also not be liable (P. Br. 77-79).

In other words, appellants are contending that an accessory cannot be held civilly liable where a principal cannot be, a criminal law notion which was rejected as long ago as *Rice v. Coolidge,* 121 Mass. 393, 396 (1876), where the court held that even though a witness had an absolute privilege to give false and defamatory testimony, the person who caused him to give such testimony could still be liable, saying:

> "The argument, that an accessory cannot be held civilly liable for an act for which no remedy can be had against the principal, is not satisfactory to our minds. The perjured witness and the one who suborns him are joint tortfeasors, acting in conspiracy or combination to injure the party defamed. The fact that one of them is protected from a civil suit by a personal privilege does not exempt the other joint tortfeasor from such suit."

The inequity of appellants' argument is apparent in the instant case: Does it seem fair that one who maliciously causes another to institute mistakenly but in good faith a harmful lawsuit should be free from liability to the persons injured thereby?

In any event, the Winans' cross-claim may scarcely be pigeon-holed as a civil malicious prosecution suit; but if it were, an action would still lie for intentionally giving false information to another resulting in harm, even though no cause would lie for malicious prosecution. *Al Raschid v. News Syndicate Co., Inc.,* 265 N.Y. 1, 191 N.E. 713.

2. Defamation

Insofar as the Winans' claim involves the liability of the appellants for defamation, the appellants' claim of

absolute privilege is unwarranted both factually and legally.

Factually, appellants Parker have premised their argument upon the basis that the representations of the Parkers to the Title and Trust Company were "*for the purpose* of having the information thus given used by the attorneys for the Title Company in bringing an action in which the Winans would be made parties defendant" (P. Br. 72-73). This is misleading. The true nature of the conferences between the Parkers and the Title and Trust Company is set forth by the District Court as follows:

> "Following discovery of the defect in title to Lot 2 by the plaintiff, defendants Parker presented a claim of loss to the plaintiff and said parties entered into settlement negotiations" (F. XLIII, Tr. 140).

The purpose of these conferences was to settle the claim of loss which the Parkers had presented and for which they had retained their attorneys (Tr. 1839). At these conferences the respective parties—the Title and Trust Company and the Parkers—bargained and negotiated at arms length, each being represented by their own attorneys, but none of the settlement proposals of either side was satisfactory to the other[24].

Legally, we again call this Court's attention to the fact that appellants' claim of absolute privilege makes its first appearance in this case in their briefs. Such a claim of privilege was not pleaded by either the Parkers or by Stegmann in their respective answers to the Wi-

---

[24]See Exhibits 10-B, Tr. 1918-1920; Exhibit 10-C, Tr. 1921-1923; Exhibit 10-D, Tr. 1924.

nans' cross-claim, nor did it ever come up during the course of the trial. Accordingly, such a claim may not now be raised, since it is settled law under the Federal Rules of Civil Procedure applicable to this case that a claim of privilege is a special affirmative defense which must be specially pleaded as well as proved. *Christopher v. American News Co.,* 171 F. 275, 277 (7th Cir. 1948); *Foltz v. Moore-McCormack Lines, Inc.,* 189 F. (2d) 537, 539 (2nd Cir. 1951).

Secondly, the limited authorities we have been able to uncover do not uphold appellants' claim of absolute privilege. On the contrary, we submit that the cases which have specifically analyzed the issue presented of whether persons in appellants' situation may find a safe haven for their actions in a claim of privilege, have held that any absolute privilege with respect to defamatory matters in pleadings does not extend to or protect persons not parties to the action who are responsible for the inclusion of such defamatory matter. *Laun v. Union Electric Co.,* 350 Mo. 572, 166 S.W. (2d) 1065 (1942); *Rice v. Coolidge,* 121 Mass. 393 (1876); *Ewald v. Lane,* 104 F. (2d) 222 (D.C. D.C. 1939); *Bigelow v. Brumley,* 138 Ohio St. 574, 37 N.E. (2d) 584 (1941); Annotation, 144 A.L.R. 633.

In the *Laun* case, supra, which we commend to this Court as containing an excellent discussion of the problem, the Missouri Supreme Court noted that the rule of absolute privilege was founded on the principle that on certain occasions it is advantageous to the public interest that a person should speak freely and fearlessly unin-

fluenced by the fear of being sued for defamation, the end to be gained by permitting such statements outweighing the harm which might be done to the reputation of others. However, the tendency and policy of the Courts has been not to extend the instances of absolute privilege, unless the policy upon which the privilege is based is found to exist in new situations. Where we have the case of persons who have some kind of interest in the proceedings and who aid and assist a party in publishing defamatory matter in a pleading, there is no reason or principle for public policy demanding the extension of the doctrine of absolute immunity to those who have thus caused the publication of libelous matters by persons who were privileged to do so.

There would appear to be no Oregon law on the point. *Strycker v. Levell,* 183 Or. 59, 190 P. (2d) 922 (1948), cited by appellants (P. Br. 74-75), is not in point, for there the plaintiff was not proceeding against those who had deceitfully been responsible for the inclusion of defamatory matter in a pleading, but was suing the very persons who had themselves as part of a judicial proceeding filed allegedly defamatory affidavits[25].

---

[25]As to any possible claim by the Parkers that their representations to the Title Company were conditionally privileged as communications between an insurance company and a policyholder, the appellants' communications were not spoken in good faith or with an honest belief of the truth but were made maliciously. Under these circumstances, as this Court recently held in *Reserve Life Ins. Co. v. Simpson,* 206 F. (2d) 389 (1953) no privilege may be claimed, citing Oregon decisions.

D. Damages

The Winans alleged in their cross-complaint (Tr. 90) and the District Court found that the present suit instituted by the Title and Trust Company and the subsequent publications of the charges therein in a Hood River newspaper damaged the Winans in that they were required to spend their own time preparing for the trial of this case and had to employ and pay for the services of attorneys in representing them, and in that it was more difficult for two of the Winans to obtain credit in connection with their businesses.

The District Court further found that as a result of appellants' "injurious falsehoods" and "slanderous statements" the Winans suffered damages in the sum of $9,000 (F. XLVI, Tr. 142; F. XLVII, Tr. 142-143).

Before considering the applicable authorities, we shall first dispose of appellants' challenge to Findings of the Court (P. Br. 85-90; S. Br. 11).

1. Evidence

In substantiation of the Findings of the District Court, the record discloses that as a result of the wrongful acts of the appellants culminating with the Winans being subjected to a lawsuit in which they did not belong, the Winans suffered damages to their reputation and to their businesses and were forced to incur litigation expenses.

As to their reputation, the record is replete with evidence that any matter affecting property on the shores of Lost Lake was a matter of extreme public interest to

all those living in the Hood River area (Tr. 1677-1678, 1694-1695, 1726; Exhibit 15-A, Tr. 1925). Consequently, news articles dealing with the sale of the Winans property on Lost Lake were widely read; and all of the witnesses from the Hood River area appearing before the District Court testified as to their familiarity with the articles in the Hood River newspapers concerning the filing of the suit against the Winans over the Lost Lake property (Tr. 1624, 1678, 1680, 1686-1687, 1696, 1728). It is uncontradicted in the record that the charges against the Winans of falsely representing their property were widely discussed (Tr. 1680, 1687, 1696). Hood River County Judge Sheldrake, who had known the Winans family for approximately 35 years and testified that the reputation of the Winans for honesty and integrity was good, stated that after the publication of the charges he heard numerous discussions during which perhaps as many as a dozen or 20 persons expressed the belief that Paul Winans would have done what was reported in the paper (Tr. 1697-1699).

Both Paul Winans and Ross Winans recounted that following the publication of the filing of the complaint many persons had questioned them about it (Tr. 1624, 1728). It is scarcely any wonder that Paul Winans testified that it was a matter of embarrassment to him to be charged with fraud and that it had affected his business operations (Tr. 1728-1729).

Secondly, the record shows that as a result of the institution of this suit against the Winans, the Hood River Branch of The First National Bank of Portland,

which had financed Paul and Linnaeus Winans for over 20 years in their logging operations with unsecured loans (except on machinery), required that substantial collateral be posted on all loans (Tr. 1680, 1681, 1683, 1729). Similarly, a plumbing and heating contractor who had been engaged in doing work on two homes in a housing development project of Paul Winans refused to extend any more credit until Winans paid him $500 and credit difficulties were experienced with two other subcontractors on the project (Tr. 1687-1691, 1729-1730). Paul Winans himself, as a result of the time he spent defending against this case, lost over three months' time which he would have otherwise spent in his logging and housing businesses (Tr. 1695, 1731-1732).

Thirdly, the record shows that in order to defend themselves against the present case filed against them by the Title Company, the Winans retained attorneys upon an agreement to pay them the reasonable value of their services (Tr. 1733). There is set forth in the record an extensive itemization of the 853 hours of legal services performed by the attorneys for the Winans, together with testimony as to the value of these services and an itemization of expenses of $576.80 incurred by the Winans which were not reimbursable as statutory costs and disbursements (Tr. 1868-1876). On the basis of the reasonable value of these services alone, the District Court could have properly awarded the Winans damages in excess of $9,000.

In their brief (pp. 91-92) appellants Parker object that there is no segregation in the itemization of legal services performed as between the defense and the pro-

secution of various claims and that in the thirteen subjects of research none related to the Winans' claim against Parkers. Of course, there was no itemization of services rendered and research done with respect to prosecuting the Winans' claim against the appellants. The purpose and point of the testimony with respect to legal services was that these were the litigation expenses which the Winans were forced to incur as a result of the tortious conduct of the appellants in deceiving the Title Company into getting them involved as defendants in this case. Hence, there was only an itemization of such services as related to the defense of the Winans.

2. Authorities

For the direct and consequential damages which the appellants caused the Winans as a result of their conspiracy to defraud the Title Company and of their intentional falsehoods and malicious wrongs, the appellants were clearly liable as a matter of law to at least the special damages caused thereby. In this case these special damages were pleaded and proved as consisting of the litigation expenses herein, including attorney fees, incurred by the Winans.

In like manner, in *Cooper v. Weissblatt,* 154 Misc. 522, 277 N.Y.S. 709 (2d Dept. 1935), as the result of intentional deceit on the part of the defendants, the plaintiff was forced to defend an action in another state and then brought an action to recover the litigation expenses and attorneys fees he had expended in defending the former action. In affirming the judgment for the plaintiff for such expenses as damages, the Court pointed

out that the plaintiff was injured through intermediate agencies set in motion by the fraud of the defendant and that he was entitled to recover the legal expenses he was forced to undergo as a result of action taken against him by such intermediate agencies.

This is in accord with the often recognized common law principle that where the wrongful act of a defendant has involved a plaintiff in litigation with others, making it necessary for him to incur expense to protect his interest, the costs and expenses, including attorneys fees, sustained by the plaintiff in the litigation with such third person are viewed as a legal consequence of the original wrongful act of the defendant and may be recovered as damages. 25 C.J.S., Damages, Sec. 50 (c), pp. 534-535; 15 Am. Jur., Damages, Sec. 144, p. 552; Restatement of Torts, Sec. 914, Vol. IV, pp. 591-593; *Security State Bank v. Johnson & Co.,* 204 Okla. 160, 228 P. (2d) 169 (1951); *Tarnowski v. Resop,* 236 Minn. 33, 51 N.W. (2d) 801 (1952); *Curtley v. Security Savings Society,* 46 Wash. 50, 89 P. 180 (1907); *Murphy v. Fidelity Abstract & Title Co.,* 114 Wash. 77, 194 P. 591 (1921).

In the *Security State Bank* case, supra, the plaintiffs brought action against defendants X and defendant Y to foreclose material liens. Defendants X brought cross actions against the defendant Y to recover damages for alleged wrongful acts in misapplying certain funds. The court held that defendants X were entitled to damages against defendant Y as measured by the attorneys fees and expenses which defendants X had incurred in defending the action brought by the plaintiff, quoting the

following language from *McGaw v. Acker,* 111 Md. 153, 73 At. 731, 734, with approval:

> ". . . where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relations with others as make it necessary to incur expense to protect his interest, such costs and expenses shall be treated as legal consequences of the original wrongful act" (204 Okla. at 164, 228 P. (2d) at 173).

On the record in this case and on the facts as found by the District Court, the Winans are also entitled as a matter of law to damages against the Parkers for defamation. For being falsely accused of criminal conduct —whether it be on the basis of slanderous utterances and conduct or on the basis of being responsible for libelous allegations in the complaint—the Winans are entitled to recover general damages for the harm done to their reputation and special damages for any particular losses they sustained. Restatement of Torts, Secs. 571 (h), 621 and 622, Vol. III, pp. 175, 313-314, 316-318.

The District Court taking all the evidence into consideration came to the conclusion that an award of $9,000 would compensate the Winans for all the harm they had sustained at the hands of the appellants. The Winans had sought $70,000 general damages, $20,000 special damages and $100,000 punitive damages. Despite the aggravated circumstances of the case, the District Court allowed no punitive damages though unquestionably authorized to do so under Oregon law[26].

---

[26]See *Linkhart v. Savely,* 190 Or. 484, 505-506, 227 P. (2d) 187, 197 (1951).

As is the situation with a jury verdict, we do not know how the District Court arrived at the award it made; but we do know that the evidence of harm to reputation, of credit difficulties and of litigation expenses substantially supports the award made, no matter how much more we believe the Winans were entitled to.

II.

The District Court did not Err in Dismissing the Cross-Claims of the Appellants Against the Appellees Winans.

Appellants Parker have specified as error the dismissal of their cross-claim against the appellees Winans (P. Br. 68). Appellant Stegmann has likewise specified the dismissal of his cross-claim against the appellees Winans as error (S. Br. 10).

Neither the brief submitted by the Parkers nor the brief submitted by Stegmann presents any argument in support of this specification of error.

The cross-claim of the appellant Chet Parker was that he should recover over from the appellees Winans the sum of $125,000, in the event that the Title and Trust Company obtained a cancellation of its title insurance policy, his claim being "based upon the allegations of plaintiff's complaint and of the counterclaim of defendant Chet L. Parker" (Tr. 94-95). Appellant Stegmann had similarly filed a cross-claim against the appellees Winans seeking to recover over against the Winans any judgment entered in favor of the Title and

Trust Company and against Stegmann, and to recover $10,000 attorneys fees by reason of the Winans "intentionally failing to disclose to defendant Stegmann the claims of the United States Government to said real property".

We submit that the Findings of the District Court as to the disclosures by the appellees Winans to the appellants Parker and Stegmann, which have heretofore been reviewed, completely lay at rest any conceivable claim which the appellants might assert against the Winans in connection with the transactions involved in this case. The Findings of the District Court in this regard being based, as we have seen, upon conflicting testimony and supported by substantial evidence in the record, are foreclosed to the appellants on this appeal.

CONCLUSION

For the reasons set forth above, the judgment below, awarding the Winans $9,000 damages and costs for the harm they sustained through the wrongful acts of the appellants and dismissing the respective claims of the appellants Parkers and Stegmann against the Winans, should be affirmed.

Respectfully submitted,

KRAUSE, EVANS & LINDSAY,
GUNTHER F. KRAUSE,
DENNIS LINDSAY,
Attorneys for Appellees Winans.